

The inefficiency depicted by Bell Atlantic (and by US West) under the current regime thus is easily overcome by having the enhanced service subsidiary provide an application that combines basic data transmission with optional protocol conversion as an untariffed, enhanced service. Such an application provides whatever protocol conversions, if any, are necessary for any given transmission. The availability of optional protocol processing obviates any need to make a decision as to the regulatory classification of any particular transmission or configuration.

If, as US West states, at 7, most current data communications services need to include some enhanced elements because of the nature of high speed data connections, the BOCs' enhanced service subsidiaries will end up providing the bulk of the BOCs' data services. Neither Bell Atlantic nor US West has explained why that should be a problem, assuming the availability of all of their basic services for unrestricted resale by their enhanced service subsidiaries and by other ESPs. Bell Atlantic therefore has not provided any reasonable justification for treating protocol processing as a basic service, and neither Bell Atlantic nor US West has provided any justification for exempting BOC protocol processing services from structural separation.

II. THE BOCs CANNOT WISH AWAY THE RECORD OF ANTICOMPETITIVE ABUSES AND THE RISK OF FURTHER ABUSES UNDER STRUCTURAL INTEGRATION

Coupled with the BOCs' assertions of public benefits arising from the elimination of structural separation are their denials of any actual or threatened anticonsumer and anticompetitive abuses resulting from such elimination. Such denials fly in the face of the extensive record of abuses in this proceeding and the Computer III Remand proceeding. For the most part, the BOCs either ignore this record or reinterpret various incidents in an attempt to render them innocuous. The BOCs also claim that the nonstructural regulations, particularly ONA and other antidiscrimination rules, provide more than adequate protection against access discrimination and cross-subsidies and that the need for such protections has been greatly reduced on account of the BOCs' declining market power. As explained in MCI's and other parties' initial comments, however, the BOCs' monopoly power over access to the local network is virtually undiminished and the nonstructural "safeguards" have been shown to be inadequate substitutes for structural separation.

A. BOC Abuses Have Continued

Notwithstanding the BOCs' blandishments as to the lack of formal complaints at the FCC alleging discrimination against ESPs, there is considerable evidence in the record, both in this proceeding and in the Computer III Remand proceeding, as to various types of such abuses. MCI discusses some of this

evidence, relating to both the prior proceeding and more recent events, in its initial Comments in this proceeding, at pages 19, 30-31, 33 and Exhibit A thereto.

Other parties have focused more specifically on recent abuses. The Association of Telemessaging Services International, Inc. (ATSI) documented numerous instances of BOC abuse against voice messaging providers, including "unhooking" the customers of competitive voice mail providers by misinforming them as to the availability of appropriate CNSs, inexplicable interconnection and CNS ordering problems faced by voice mail providers and discriminatory interconnection charges for customers of competitive voice messaging services.^{47/} The Statement of Michael Rabb, attached to the Hatfield Reply, describes the type of discriminatory behavior faced by small voice messaging service providers, particularly the charging of a higher total amount for the BOC network components used by ESPs than the BOCs charge for their own comparable enhanced services. CompuServe describes numerous examples of discrimination against itself and other ESPs in its Comments, at pages 36-47. The Information Technology Association of America (ITAA), at pages 49-53, describes other instances of discrimination. MCI, at 42-44 and CompuServe at 27-34, also describe various federal and state audits revealing multiple instances of cross-subsidies.

^{47/} Letter from Robert J. Butler to William F. Caton, FCC, dated Dec. 13, 1994, with attachments.

All of those recent instances demonstrate that the MemoryCall Order and other discriminatory conduct reflected in the Computer III Remand record, discussed in Exhibit A to MCI's initial Comments in this proceeding, are still just as relevant as they were then to any reasonable assessment of the risks of future discriminatory conduct under structural integration. Recognizing the BOCs' vulnerability on the issue of access discrimination, BellSouth devotes considerable space to a revisionist interpretation of the MemoryCall case, under which the gross discriminatory abuses found by the Georgia PSC, which this Commission stated "would" violate the CEI and ONA rules,^{48/} are claimed to have actually been efforts to provide a greater degree of access than required by CEI or ONA.^{49/}

BellSouth, in spite of itself, states part of the problem succinctly:

[T]wo call forwarding features useful to customers of voice messaging services would work with the network service architecture utilized by MemoryCall service, but would not work in all switch types with the network architecture the [competitors] utilized.^{50/}

Notwithstanding that technical obstacle to competitive voice messaging providers, BellSouth went ahead and offered its own MemoryCall service before fixing the problem. Moreover,

^{48/} Computer III Remand Order, 6 FCC Rcd at 7623, n.211.

^{49/} BellSouth Comments at 32-50.

^{50/} Id. at 36.

BellSouth does not even mention the finding of "unhooking" in the MemoryCall case, which this Commission noted in the Computer III Remand Order^{51/} and had previously prohibited in granting BellSouth's CEI plan for its MemoryCall service.^{52/} Thus, in spite of BellSouth's efforts to brush MemoryCall under the rug, that case remains a powerful indictment of the BOCs' participation in voice messaging service on an unseparated basis.

These instances of actual abuse must be given great weight in the Commission's assessment of the costs and benefits of eliminating structural separation. It must be assumed, moreover, that these examples are only the tip of the iceberg, since there has not been a systematic review of complaints on file in all 50 states. That these problems keep appearing demonstrates that the Commission's nonstructural regulations simply cannot be expected to make a significant impact on BOC behavior and therefore must be discounted in any rational cost-benefit analysis. Furthermore, as discussed below, the BOCs' endorsements of the nonstructural regulations are unpersuasive even putting aside all of the evidence of ongoing actual abuse.

^{51/} 6 FCC Rcd at 7623, n.211.

^{52/} BellSouth Plan for Comparably Efficient Interconnection for Voice Messaging Services, 3 FCC Rcd 7284, 7293 (1988).

B. Competitive Developments Have Not Reduced the Risk of Abuses

In a reprise of their bypass arguments from previous proceedings, the BOCs argue that a variety of competitive and regulatory developments have so loosened the local access bottleneck that their ability and incentives to discriminate against ESPs and to cross-subsidize have been greatly minimized. Pacific Bell presents the most extensive argument on this issue. It claims that ESPs can now choose from a variety of access avenues and thus are no longer bound to the BOCs' local networks, citing local exchange competition initiatives in various states, private corporate and governmental networks and the IXCs' virtual private networks, the unbundling brought about in the Expanded Interconnection proceeding,^{52/} cable TV providers and the convergence of telephone and cable TV, wireless providers, IXCs' intraLATA networks and local exchange bypass and value added networks (VANs). Pacific Bell concludes that the BOCs lack market power and that any discrimination by them would simply

^{52/} Expanded Interconnection with Local Telephone Company Facilities, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992), recon., 8 FCC Rcd 127 (1992), further recon., 8 FCC Rcd 7341 (1993), vacated in part and remanded sub nom. Bell Atlantic Telephone Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994); Expanded Interconnection with Local Telephone Company Facilities, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374 (1993), pet. for review pending sub nom. Bell Atlantic v. FCC, No. 93-1743 (D.C. Cir., filed Nov. 12, 1993); Expanded Interconnection with Local Telephone Company Facilities, Transport Phase II, Third Report and Order, 9 FCC Rcd 2718 (1994); see also Expanded Interconnection with Local Telephone Company Facilities, Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994), appeal docketed sub nom. Southwestern Bell Telephone Co. v. FCC, No. 94-1547 (D.C. Cir. Aug. 10 1994).

drive ESPs to these other alternatives.^{54/}

Ameritech and NYNEX also mention the convergence of communications, information and entertainment outlets as an important trend lessening dependence on access to the BOCs' local networks. They argue that the expanding availability of alternative distribution vehicles is eliminating the BOCs' incentives and ability to discriminate.^{55/}

As explained in the Hatfield Report filed in support of the initial comments of MCI, CompuServe and ITAA, however, there is actually little or no competition with the BOCs' local exchange service today, and significant competition is not likely to emerge for many years. Nationwide, competitors have captured less than two percent of the exchange access business and a much smaller percentage of the local exchange business.^{56/}

What the BOCs conveniently ignore in their presentations is that all of the local exchange competition initiatives at the state commissions and the Expanded Interconnection proceeding conducted by this Commission have nothing to do with bypass of

^{54/} Pacific Bell Comments at 27-51. See also Ameritech Comments at 5; NYNEX Comments at 16-18 ("ESPs can completely bypass NYNEX's network").

^{55/} Ameritech Comments at 5-8. See also NYNEX Comments at 18.

^{56/} Hatfield Associates, Inc., ONA: A Promise Not Realized -- Reprise, at 4 (April 6, 1995) (Hatfield Report).

the BOCs' networks. Rather, those proceedings are only providing more choices as to where to interconnect with the BOCs' networks.^{57/} Every minute of traffic carried by a CAP making use of the unbundling brought about pursuant to the Expanded Interconnection proceeding will also be switched and carried by the BOC or LEC serving that region. Similarly, the various private and virtual private networks, IXC intraLATA networks and VANs mentioned by Pacific Bell all interconnect with, and are entirely dependent upon, the BOCs' and LECs' local networks. VANs are an especially strange example for Pacific Bell to cite, since they are also ESPs that are just as dependent on the local exchange networks as any other ESPs. Contrary to Pacific Bell's imaginative conception, another ESP interconnecting with a VAN thus is hardly escaping dependence upon the BOCs and LECs.

The BOCs' discussions of access alternatives for ESPs are also invalidated by their failure to understand the manner in which ESPs need to access the network. As ITAA points out in its initial Comments, at 6-7, an ESP is not merely interested in the one interconnection between its database or computer switch and the BOC network. An ESP is totally dependent on the BOC for the ability of its customers to gain access to the ESP's services, because the overwhelming majority of those customers have no bypass alternatives available to them to reach the ESP. An ESP's customers must have the ability to access the ESP's services

^{57/} Id. at 4-5.

under the same terms and conditions as they can access the BOC's own enhanced service offerings. In other words, it is the provision of equitable serving arrangements to the mass of potential ESP customers that is key, not the much narrower issue of the ESP's ability to obtain its connection to the network from an alternative supplier.

The examples of abuse in the record in this proceeding demonstrate how vulnerable ESPs are to BOC discrimination in providing the ESPs' customers with CNSs and other network features required to utilize the ESPs' services. ESPs thus cannot avoid dependence on and interconnection with the BOCs. Since the overwhelming majority of the ESPs' customers, especially residential, have no choice but to use the BOCs' local exchange services, ESPs have no choice either.

As for wireless, cable TV and the other alternatives discussed by the BOCs in their initial comments, those media have only just begun to pose the threat of future potential competition to the BOCs, and it will be many years before any of those possibilities blossoms into actual competition.^{58/} The abuses detailed in MCI's initial comments, at 33-38, also confirm the BOCs' continuing monopoly power, since only monopolists would have the incentive and ability to discriminate so egregiously. It must be concluded that the BOCs' bottleneck monopoly will

^{58/} Hatfield Report at 5-9.

endure for some time, providing them with the ability and incentive to discriminate against ESPs.

C. Neither ONA Nor Other Regulatory Initiatives Have Led to Significant Unbundling Benefitting ESPs

Since the BOCs still enjoy overwhelming local access market dominance, unbundling the network elements useful to ESPs remains absolutely crucial to an effective scheme of nonstructural regulations. Unfortunately, the BOCs' comments illustrate why ONA will never come to fruition. They take the position that ONA is fully developed now and that no further unbundling is necessary. Notwithstanding the contrary findings in California II and California III, the BOCs insist that ONA is sufficient, especially in conjunction with the other nonstructural antidiscrimination rules, to prevent discrimination.^{59/} They describe the ONA process in glowing terms^{60/} and claim that ONA and/or other unbundling initiatives have already resulted in the fundamental unbundling envisioned in Computer III.^{61/} It can therefore be assumed that any further ONA unbundling will be

^{59/} E.g., NYNEX Comments at 6-7. Bell Atlantic, at 21, confuses the issue here by stating that the Commission must determine "whether the benefits of structural relief under the existing ONA rules outweigh the cost of 'fundamental unbundling.'" It is not clear what Bell Atlantic is trying to say here, but it has certainly not stated the issue accurately. The issue here is whether the public benefits of eliminating the structural separation requirement would outweigh the risks of anticonsumer and anticompetitive abuse caused by such a change, in light of the nonstructural protections now in place.

^{60/} See Pacific Bell Comments at 53-55.

^{61/} See Bell Atlantic Comments at 23.

resisted by the BOCs even more fiercely than they have resisted the minimal unbundling required to date. That resistance alone should be sufficient reason to maintain the structural separation requirement for the foreseeable future.

The BOCs claim that the ONA service request process has been responsive to ESPs' needs, repeating the Commission's observation in the Notice that over 150 ONA services have been made available by one or more of the BOCs.^{62/} Southwestern Bell argues that the current level of unbundling is sufficient and that further unbundling would serve no purpose and impose unnecessary costs because the enhanced service market is already fully competitive. In that situation, according to Southwestern, further unbundling of "upstream," or "wholesale," inputs cannot make the "downstream," or "retail," enhanced service market more efficient.^{63/} US West argues that ONA has been so successful because it is "market driven."^{64/} NYNEX discusses the ONA service requests from ESPs that it has met, stating that "NYNEX has thus provided ESPs with the network services they need to create and introduce their own enhanced services."^{65/} NYNEX and Pacific Bell also refer to the observations in the Notice that no

^{62/} Notice at ¶ 19, cited in BellSouth Comments at 22; Ameritech Comments at 3-4, 12.

^{63/} Southwestern Bell Comments at 29.

^{64/} US West Comments at 20.

^{65/} NYNEX Comments at 8.

ESP has formally complained that a BOC has unreasonably refused to respond to a new service request "which meets the ONA service criteria."^{66/}

In a similar vein, Ameritech goes so far as to claim that the growth of enhanced services is due, in part, to the "rich array of network functionality which is now available to" ESPs from the BOCs.^{67/} Ameritech later rebuts its own claim, however, by pointing out that ONA does not provide significant public interest benefits, since ESPs do not use it.^{68/} Southwestern Bell complains that some of the requests for unbundling are really situations where competitors are trying to get individual components that comprise BOC access service priced such that the sum is less than the overall price of the BOC access service package.^{69/}

The silver lining in all of these comments is that, like a Rorschach test, they reveal the BOCs' anticompetitive attitudes far more clearly than could ever be gleaned from responses to a direct question about competition. For example, Southwestern Bell's comment about not having to unbundle upstream inputs is

^{66/} Id.; Pacific Bell Comments at 53. See also US West Comments at 22.

^{67/} Ameritech Comments at 3.

^{68/} Id. at 17-18.

^{69/} Southwestern Bell Comments at 28.

only true where the input is not a monopoly. Where, as here, the network service is a monopoly, unbundling is an absolutely necessary precondition to viable competition in the downstream market. Southwestern Bell, in effect, wants to retain its monopoly while being treated like a nondominant carrier. US West is also correct, albeit inadvertently, in stating that ONA is "market driven;" the BOCs have not provided ONA services that might have been useful to their competitors.

The BOCs also overlook another fatal defect of ONA -- it is too expensive for ESPs. The highly bundled basic serving arrangements (BSAs) that ESPs are required to use if they want individual basic service elements have many features that ESPs do not need and cannot afford. As a result, ESPs simply do not use ONA.^{70/} Pacific Bell concedes that ESPs are not using ONA but brushes that fact aside as "a pricing issue."^{71/} That characterization of the issue should provide no comfort, however. A "safeguard" that is too expensive, for whatever reason, is no safeguard at all. Even if the highly bundled BSAs were cost based, ONA still could not be an adequate protection against discrimination.

Moreover, when one looks behind the raw numbers of ONA services, it becomes clear that ONA has not developed

^{70/} ITAA Comments at 23-29; Hatfield Report at 12-13.

^{71/} Pacific Bell Comments at 54.

significantly since the BOCs' ONA plans were originally filed.^{72/} The BOC ONA Amendment Order shows that of the initial 118 requests for ONA services, only 29 were offered by all seven of the RBOCs in their original ONA plans filed in early 1988, and that figure increased to only 37 in the amended ONA plans filed in 1989.^{73/} In comparing those figures with the current status of ONA, it should be noted that the BOCs have boiled down those original 118 requests into 102 separate ONA services. As of July 1994, only 19 of those 102 ONA services have been fully deployed by all seven RBOCs,^{74/} which is about where the BOCs began in 1988. This lack of progress is especially disheartening in light of the fact that the original ONA plans were themselves characterized by the Commission as consisting largely of "limited"^{75/} sets of previously existing access services and features.^{76/} Thus, in terms of useful services, ONA has not significantly developed beyond the theoretical outline first suggested in Computer III.

^{72/} See Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1 (1988) (BOC ONA Order), recon., 5 FCC Rcd 3084 (1990) further order, 5 FCC Rcd 3103 (1990) (BOC ONA Amendment Order), aff'd sub nom. California v. FCC, 4 F.3d 1505 (9th Cir. 1993).

^{73/} 5 FCC Rcd at 3123, Appendix C, Table 2.

^{74/} See Hatfield Report at 12.

^{75/} BOC ONA Order, 4 FCC Rcd at 66.

^{76/} Id. at 168-69, 176, 196-202.

BellSouth, which has never taken ONA seriously,^{77/} goes the furthest in attempting to rewrite the Commission's original ONA goals so that they can be shown to have been met. In BellSouth's revisionist interpretation, it is improper for the Commission to even acknowledge the possibility that a BOC's denial of an ESP request for a new ONA service might be a discriminatory exercise of market power. BellSouth insists that such a service request denial can be perfectly justified under the Commission's technical and economic "feasibility" criteria and implies that the ONA service request process was not intended to protect ESPs against access discrimination. BellSouth goes on to claim that fundamental unbundling itself was never conceived of as an antidiscrimination device. Instead, it was simply a means of providing ESPs with the BOC network features they needed. Thus, fundamental unbundling is not "a safeguard unto itself," according to BellSouth, but, rather, a "separate potential policy initiative" for which BellSouth expects additional favors from the Commission in the form of even more "relaxed regulation."^{78/}

One can only stand in awe in the face of such brazen overreaching. As the Commission has explained, fundamental

^{77/} See discussion at pages 32-33 of the Joint Brief of Petitioners MCI Telecommunications Corporation, in Case No. 92-70186, and Newspaper Ass'n of America, in Case No. 92-70261, California v. FCC, No.92-70083 and consolidated cases (9th Cir. filed April 21, 1993), attached as Appendix A to MCI's initial comments.

^{78/} BellSouth Comments at 8-11.

unbundling and the ONA service request process were the heart of the Commission's antidiscrimination goals for ONA. Fundamental unbundling was viewed by the Commission as a means of enabling ESPs to pick and choose the network features they needed, thereby making it impossible for BOCs to discriminate in the provision of access.^{79/} Once ONA had achieved its goals, structural separation could be eliminated.^{80/}

Now, by pretending that fundamental unbundling was never an antidiscrimination goal of ONA, BellSouth argues that structural separation should be eliminated anyway, even without fundamental unbundling, and that if fundamental unbundling is someday achieved, an additional regulatory benefit should be conferred on the BOCs in return. BellSouth's revisionism betrays an attitude shared by all of the BOCs, namely, that ONA is something to be observed in name only and that the BOCs should try to get by with as little unbundling as they can get away with.

The BOCs support their endorsements of ONA by reference to the IILC process, which they characterize as another avenue for

^{79/} See FCC California I Br. at 25, 28, 104; Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase I, 104 FCC 2d 958, 1063 at ¶ 211 (1986) (Computer III Order) (goal of ONA is "controlling discrimination"), on reconsideration, 2 FCC Rcd 3035 (1987); Phase II, 2 FCC Rcd 3072 (1987) (collectively, Computer III Orders), vacated and remanded sub nom., California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

^{80/} Computer III Order, 104 FCC 2d at 1067-68.

ESPs to expand their network access opportunities.^{81/} Pacific Bell mentions, in particular, IILC issue #026 -- Long Term Unbundling and Network Evolution -- as an example of the BOCs' effort to unbundle.^{82/} The Affidavit of Peter P. Guggina, attached as Exhibit B to MCI's initial comments, explains why that example demonstrates the utter uselessness of the IILC process and the dead-end it guarantees for any attempt to move the ONA process along. Because of the ponderous, multi-layered review process that the BOCs require in this forum, issue #026 has already taken four years, and additional specifications remain to be developed before any resolution could ever be implemented. Moreover, the BOCs have raised numerous policy issues in connection with Issue #026 that will further delay its resolution and implementation. Issue #026 is being "sliced" into sub-issues, all of which are likely to be referred to standards committees and related industry fora for still further development. In short, the resolution of Issue #026 will take many more years, and implementation may never happen.^{83/} That this slow-rolling would be highlighted as a prize example in a BOC's defense of the IILC process is the most searing indictment imaginable of ONA.

^{81/} See, e.g., BellSouth Comments at 24-25; Ameritech Comments at 10; Pacific Bell Comments at 53.

^{82/} Pacific Bell Comments at 53-54.

^{83/} Guggina Affidavit at 4-5.

The BOCs also discuss the unbundling made possible through the deployment of advanced technologies, such as AIN, SS7 and ISDN,^{84/} and the Intelligent Networks proceeding.^{85/} BellSouth stresses the "mediated" access to its network made possible by AIN services. BellSouth claims that the deployment of service management system access to its AIN capabilities will allow ESPs to design and deploy the network features they need.^{86/} Pacific Bell, on the other hand, insists that mediated access to its AIN capabilities is not needed to prevent BOC access discrimination, since cellular providers, CAPs and IXCs also provide IN services.^{87/}

Pacific Bell insists, nevertheless, that its network is "open and transparent" to interconnectors and that it intends to provide "appropriate access" to its AIN "on an unbundled basis."^{88/} Pacific Bell argues that, in order to maintain network integrity, the BOCs should not have to provide third-party access to the AIN service logic, as would be required under mediated access. Instead, the BOCs should only be required to

^{84/} See, e.g., BellSouth Comments at 25; Pacific Bell Comments at 58-68.

^{85/} BellSouth Comments at 26; Bell Atlantic Comments at 23-24. See Notice of Proposed Rulemaking, Intelligent Networks, 8 FCC Rcd 6813 (1993).

^{86/} BellSouth Comments at 26-28.

^{87/} Pacific Bell Comments at 58-61.

^{88/} Id. at 62-66.

provide access to the data elements and options. The third-party provider could then develop a service, and the AIN platform owner would test the service logic and build a template of it.^{89/}

Pacific Bell's arguments do not justify its resistance to mediated access to its AIN capabilities. That other carriers, interconnected with the BOCs, also provide IN services is irrelevant, unless they can access the BOCs' switches and provide direction to them. Lacking such control of the BOCs' networks by third-party IN providers, ESPs are left totally dependent on access to the BOCs' IN in order to provide intelligent services to the ESP customers who are BOC local exchange service customers.

Pacific Bell's arguments against mediated access are strikingly parallel to the equally anticompetitive and unjustified BOC arguments against the use of non-Bell CPE in the 1970's. The only differences are that, instead of CPE, the subject is the IN, and instead of interposing Protective Connecting Arrangements between non-Bell CPE and the networks, Pacific Bell wants to deny access to AIN service logic. The result would be that only the BOCs would be able to define and implement new IN services; ESPs would be limited to controlling the "data elements and options" associated with the BOC-defined services.

^{89/} Id. at 66-68.

Rather than allowing the BOCs to be the sole sources of IN service definition, acting as gatekeepers to their private AIN preserve, the following principles should apply:

- Any actions to safeguard the integrity of the network should apply to all parties, including the BOCs themselves;
- There should be an open process for defining service "primitives"^{90/} that are used by all parties to build IN services;
- Any such primitives utilized by Pacific Bell, and the way in which they are utilized, should be available to all other parties as well;
- All of the rules of network information disclosure should apply to the implementation of new IN primitives; and
- If testing of feature interaction, or other aspects of IN services, is necessary, it should be conducted by a third party, not by the BOCs -- there should be no step in the process in which the BOCs either gain access to competitively-sensitive information or can make unilateral judgments about the efficacy and timing of any particular service implementation.

If these principles are not followed, the BOCs will be able to continue thwarting the development of ONA as applied to IN services.^{91/}

These principles can best be implemented by maintaining structural separation, rather than relying on ONA. Structural separation would serve, for instance, to ensure that all ESPs would have an equal opportunity to influence the definition of

^{90/} One example is what Pacific Bell refers to as "enabling services."

^{91/} See also Hatfield Report at 26-28.

service primitives. Likewise, any testing necessary to ensure that damaging feature interaction does not occur would be done by the separated basic service provider, which presumably would have a more dispassionate role in the testing process and could act to protect the sensitive information it acquired in the testing process.

The BOCs also mention the unbundling that has been forced on them in various state commission local competition proceedings and in this Commission's Expanded Interconnection proceedings as alternative avenues to the type of unbundling originally envisioned in the Commission's ONA policies. They argue that, irrespective of the development of ONA, these other unbundling initiatives are providing ESPs with all of the network features they need.^{92/} NYNEX asserts that "the Commission has effectively achieved 'fundamental unbundling' through other proceedings," such as Expanded Interconnection and the local exchange competition developing in states such as New York. BellSouth states that ESPs can now order the BOCs' virtual collocation services or special access services from CAPs, allowing them to connect their trunks to BOC switches.^{93/} Pacific Bell describes the unbundling undertaken as part of local exchange competition and the Expanded Interconnection proceeding as the "most concrete

^{92/} BellSouth Comments at 28-29; Ameritech Comments at 13-14, 16; Bell Atlantic Comments at 23; Pacific Bell Comments at 55-68.

^{93/} BellSouth Comments at 29.

aspect of the 'fundamental unbundling' that was discussed in "Computer III and claims that the goal of fundamental unbundling has essentially been reached.^{94/}

To some extent, these unbundling policies are the same policies cited by the BOCs as providing bypass options for ESPs.^{95/} In fact, NYNEX concludes that access discrimination is "now difficult, if not impossible," since "ESPs can completely bypass NYNEX's network."^{96/}

The problem with the BOCs' analysis is that it fails to recognize the different interconnection and access needs of ESPs and other types of service providers. The unbundling required in the Expanded Interconnection and local competition proceedings allows other entities to displace a physical portion of the local network, such as local transport, while using the remaining portions. Such displacement would be useful, for example, for an entity carrying a large volume of traffic that could be concentrated along the transport path sought to be displaced.

The primary goal of ONA, however, is to break down all of the BOC's switching capabilities into their fundamental components. An ESP's primary need is not so much to displace a

^{94/} Pacific Bell Comments at 57.

^{95/} See Pacific Bell Comments at 56-57.

^{96/} NYNEX Comments at 16-18.

physical portion of the local network in order to carry a large volume of traffic between two points, but, rather, as explained previously, to have the widest possible range of switching capabilities made available by the BOC to all of the ESP's customers as well as the ESP. Thus, the physical unbundling required in Expanded Interconnection and state local competition proceedings is largely irrelevant to ESPs. Accordingly, ESPs still do not have the nondiscriminatory access to fundamentally unbundled network switching capabilities that was originally promised in Computer III.

D. The Other Nonstructural Regulations Are Inadequate to Deter Discrimination and Cross-Subsidies

1. Discrimination

Since ONA has not developed beyond service-specific CEI standards, the BOCs devote considerable attention to those standards.^{97/} Like much of the BOC presentations, these discussions beg the question. The issue is not whether a given requirement is a positive step, standing alone, but whether all of the nonstructural rules, taken together, provide an effective substitute for structural separation. Since there is not going to be fundamental unbundling in the foreseeable future, ESPs are not going to be able to pick and choose network features, which

^{97/} BellSouth Comments at 13-20; Ameritech Comments at 10; NYNEX Comments at 7.

is the most effective protection against access discrimination. Without that unrestricted access for ESPs, CEI can take ESPs only so far. If they want to configure a given enhanced service any differently from a BOC, they are out of luck in that BOC's service territory, since, under CEI, a BOC only has to provide ESPs the particular ONA service the BOC itself is using for its own enhanced services. Thus, as ITAA puts it, CEI is ineffective without an adequate ONA regime.^{98/}

The BOCs also discuss the other antidiscrimination regulations -- customer proprietary network information (CPNI) disclosure rules, network disclosure requirements and non-discrimination reporting requirements.^{99/} Except for the nondiscrimination reports, these rules are about the same as the rules that were promulgated in conjunction with the Computer II regime.^{100/} Since they were deemed necessary in conjunction with structural separation, they cannot provide a logical predicate for the elimination of structural separation.^{101/} ITAA, in its

^{98/} See ITAA Comments at 20-22.

^{99/} Ameritech Comments at 10-11; NYNEX Comments at 9-10.

^{100/} See 47 C.F.R. § 64.702(d)(2), (3).

^{101/} See Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Servs. and Cellular Communications Servs. by the Bell Operating Cos., 95 F.C.C.2d 1117, 1134 (1983) ("[a]doption of structural separation in addition to these measures reflects our belief that these measures are not sufficient to ensure fair competition"), aff'd sub nom. Illinois Bell Tel. Co. v. FCC, 740 F.2d 465 (7th Cir.), recon. denied, 49 Fed. Reg. 26056 (June 26, 1984), aff'd sub nom. North Am. Telecommunications Ass'n v. FCC, 772 F.2d 1282 (7th Cir. 1985).

initial Comments, thoroughly catalogues the deficiencies of these regulations,^{102/} and they should be ignored in the Commission's cost-benefit analysis.

2. Cross-Subsidies

The BOCs generally accept the Commission's incorrect view that since the court, in California III,^{103/} accepted the Commission's findings as to the steps taken to deter and control cross-subsidies, nothing needs to be said on that issue in this proceeding. That, of course, is incorrect, since, as noted in MCI's initial comments, any decision based on the effectiveness of the nonstructural regulations will have to take into account all significant factors bearing on such effectiveness. In other words, a cost-benefit analysis has to be based on a weighing of all costs against all benefits of a proposed policy.^{104/} The BOCs' continuing ability and incentives to cross-subsidize, demonstrated by the audits discussed in MCI's and others' initial comments, therefore must be considered in deciding whether to eliminate structural separation.

Although the BOCs generally take the view that the regulatory protections against cross subsidies need not be reviewed now, some of the BOCs briefly discuss the cost

^{102/} ITAA Comments at 29-34.

^{103/} 39 F.3d at 926-27.

^{104/} See MCI Comments at 24 n.45.